

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

<b>STATE OF OKLAHOMA,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 05-cv-329-GKF(PJC)</b>
	)	
<b>TYSON FOODS, INC., et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**STATE OF OKLAHOMA'S MOTION IN LIMINE TO  
PRECLUDE CERTAIN ARGUMENT, QUESTIONING OR  
INTRODUCTION OF "EVIDENCE" BY DEFENDANTS PERTAINING  
TO THE STATE'S REGULATION OF POULTRY WASTE**

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Plaintiff, the State of Oklahoma ("the State"), respectfully moves this Court for an order to preclude argument, questioning or introduction of "evidence" by Defendants at trial that suggests or tends to suggest:

- that the State issues permits for land application of poultry waste;
- that the State issues animal waste management plans;
- that an animal waste management plan is a permit to land apply poultry waste;
- that an animal waste management plan permits or authorizes a specific land application rate of poultry waste;
- that the State approves or has approved any particular instance of land application of poultry waste in the IRW;
- that compliance with an animal waste management plan necessarily equates to full compliance with Oklahoma law applicable to land application of poultry waste; or
- that the State promotes land application of poultry waste in the IRW.

As a matter of law, none of these assertions is true. Accordingly, assertions such as these by Defendants should not be allowed in these proceedings.

# **I. Legal Standard**

"Evidence which is not relevant is not admissible." Fed. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Moreover, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

## II. Argument

In these proceedings, Defendants have variously asserted that the State permits, authorizes and promotes land application of poultry waste. *See, e.g.*, DKT #1930 at p. 1 (" . . . Oklahoma has regulated, authorized, and even encouraged, the conduct in question"); at p. 1 fn. 1 (" . . . ODAFF issues Animal Waste Management Plans that specifically authorize farmers to apply litter to fields in excess of STP 65 . . ."); DKT #2033 at p. 18 ("Oklahoma . . . regulate[s] the application of poultry litter from soup to nuts, dictating . . . where they may [apply litter], under what conditions, and in what amounts on each individual parcel of land"); DKT #2231 at p. 7 ("[T]hese plans are required permits, which the state issues . . ."); DKT #2055 at p. 3 ("The state-approved poultry litter management plans . . . dictate the time, method, location, and amount of poultry litter that may be applied"); DKT #2055 at p. 15 ("Oklahoma . . . expressly authorize[s] the land application of poultry litter in the IRW"). Assertions of this sort are, as a matter of law, incorrect. As such, argument, questioning or "evidence" by Defendants pertaining to such assertions are irrelevant, and should be precluded. *See* Fed. R. Evid. 402.

### A. The State's statutory programs addressing poultry waste are focused on poultry waste as an environmental pollutant

With respect to the management of poultry waste, the State has a number of statutory programs. These statutory programs are focused on poultry waste as an environmental pollutant. *See, e.g.*, Drew L. Kershen, *The Risks of Going Non-GMO*, 53 Okla. L. Rev. 631, 652 fn. 19 (2000) (noting that "Oklahoma was the first state to pass an environmental statute that specifically focused on the poultry industry as a source of pollution"). As pertains to the issues in this lawsuit, these statutory programs include: (1) the Oklahoma Registered Poultry Feeding Operations Act, 2 Okla. Stat. § 10-9, *et seq.*; (2) the Oklahoma Poultry Waste Transfer Act, 2 Okla. Stat. § 9-10.13, *et seq.*; (3) the Oklahoma Poultry Waste Applicators Certification Act, 2

Okla. Stat. § 10-9.16, *et seq.*; and (4) the Education Program on Poultry Waste Management, 2 Okla. Stat. § 10-9.22, *et seq.*<sup>1</sup> In addition to these specific statutory programs, the State also has a number of statutory provisions that address poultry waste from a more general standpoint. These include, without limitation, 27A Okla. Stat. § 2-6-105 of the Environmental Quality Code and 2 Okla. Stat. § 2-18.1 of the Agricultural Code.

**1. The Oklahoma Registered Poultry Feeding Operations Act, 2 Okla. Stat. § 10-9, *et seq.***

The Oklahoma Registered Poultry Feeding Operations Act (the "ORPFOA") is the primary statute pertaining to the management of poultry waste in Oklahoma. The purpose of the ORPFOA is to control run-off and discharges from land applied poultry waste. *See, e.g.*, Okla. Admin. Code § 35-17-5-1 ("These rules shall serve to control nonpoint source runoff and discharges from poultry waste application of poultry feeding operations").<sup>2</sup>

Under the ORPFOA, all poultry feeding operations must register with the State. *See* 2 Okla. Stat. § 10-9.3. Registered poultry feeding operations are, in turn, required to utilize best management practices in managing poultry waste. *See* 2 Okla. Stat. § 10-9.7(A). Best management practices are defined in this act as "schedules of activities, prohibitions of practices, maintenance procedures and other practices which prevent or reduce the pollution of waters of the state . . . ." *See* 2 Okla. Stat. § 10-9.1(B)(2). Included among the required criteria of the best management practices are that "[p]oultry waste handling, treatment, management and removal

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<sup>1</sup> There is also a statutory program pertaining to concentrated animal feeding operations entitled the Oklahoma Concentrated Animal Feeding Operations Act, *see* 2 Okla. Stat. § 20-40, *et seq.*, but given that there are presently no active concentrated animal feeding operations in the IRW, this statutory program is not applicable.

<sup>2</sup> Okla. Admin. Code § 35-17-5-1, *et seq.*, are the implementing regulations for the ORPFOA.

shall[] not create an environmental or a public health hazard, [and] not result in the contamination of waters of the state . . . ." *See* 2 Okla. Stat. § 10-9.7(B)(4)(a) & (B)(4)(b).

Best management practices are to be implemented, in part but by no means exclusively, by means of an animal waste management plan. *See* 2 Okla. Stat. § 10-9.7(C). Under the ORPFOA, an animal waste management plan is "a written plan that includes a combination of conservation and management practices designed to protect the natural resources of the state . . . ." *See* 2 Okla. Stat. § 10-9.1(B)(1) (emphasis added). An animal waste management plan by itself, however, does not guarantee that the State's natural resources will be protected from pollution from poultry waste. In fact, the conservation and management practices of an animal waste management plan are all subject to the overarching requirement that, in any application of poultry waste, "[d]ischarge or runoff of waste from the application site is prohibited." *See* 2 Okla. Stat. § 10-9.7(C)(6)(c); *see also* Okla. Admin. Code § 35-17-5-5(a)(7)(C) ("Runoff of poultry waste from the application site is prohibited").<sup>3</sup>

Animal waste management plans are not issued by the State. *See* Okla. Admin. Code § 35-17-5-2 ("The [animal waste management] plan shall be prepared by the USDA NRCS or an entity approved by the State Department of Agriculture").<sup>4</sup>

Further, an animal waste management plan is not a permit or authorization to land apply poultry waste. Rather, it is a guidance document. This point, apparent from the plain language

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<sup>3</sup> "Runoff" is defined under Okla. Admin. Code § 35-17-5-2 as "any release by leaking, escaping, seeping, or leaching of poultry waste into waters of the State."

<sup>4</sup> Teena Gunter, the State's 30(b)(6) designee on poultry growing operations and management of poultry waste and deputy general counsel at Oklahoma Department of Agriculture, Food and Forestry ("ODAFF"), testified that persons under contract with ODAFF write some of these waste management plans pursuant to a federal grant; however, they are not being written by ODAFF, but rather "as though we were an NRCS field office." *See* Ex. 1 (Gunter Depo., 81:11-82:16); *see also* Ex. 1 (Gunter Depo., 243:19-244:19).



of the ORPFOA, was confirmed time and time again in Defendants' depositions of the State's witnesses. Teena Gunter, the State's 30(b)(6) designee on poultry growing operations and management of poultry waste and deputy general counsel at ODAFF, testified that "a plan is not rote, thou shalt do this, that shalt do this and you'll never have a problem. A plan is just exactly what it says. It's a plan. Here's guidelines. Here's things you need to take into consideration. . . ." *See* Ex. 1 (Gunter Depo., 179:3-7). Similarly, John Littlefield, a contract poultry inspector for ODAFF, testified that: "I wouldn't say that [following an animal waste management plan] protects [the natural resources of the State]. I think that is a source is designed to protect. I -- I like the wording designed. I think that yes, it will help, but I don't think it's the whole -- the whole answer." *See* Ex. 2 (Littlefield Depo., 107:1-5). Likewise, Dan Parrish, director of the Agricultural Environmental Management Services division at ODAFF, testified that: "These plans provide guidance of how they should use their poultry waste, and then there are other guidance they should also refer to besides these plans." *See* Ex. 3 (Parrish Depo., 152:1-4). Miles Tolbert, former Oklahoma Secretary of the Environment, testified that: ". . . I think there's no permit that's issued in the poultry context. So I don't know that you could say [land application of poultry waste in the IRW] is somehow expressly allowed." *See* Ex. 4 (Tolbert Depo., 222:14-17). *See also* Ex. 5 (Strong Depo., 245:14-22) (J.D. Strong, current Secretary of the Environment, testifying that he does not believe that an animal waste management plan constitutes permission to apply a certain amount of phosphorus into the environment within the State of Oklahoma).

Yet further, nothing in an animal waste management plan approves of any particular rate of or instance of land application of poultry waste. As explained above, an animal waste management plan is simply one of the requirements for operation of poultry feeding operation in

Oklahoma and only one of many elements of best management practices. Therefore, compliance with an animal waste management plan does not necessarily equate to full compliance with the requirements of Oklahoma law regarding protecting the environment from contamination from poultry waste (although, of course, failure to comply with an animal waste management plan would equate to a failure to comply with Oklahoma law). As Ms. Gunter testified:

Q: . . . Would you agree with me that there has to be a violation of the animal waste management plan before there can be a runoff in this as --

A: No.

Q: No. So your testimony is I can -- Farmer Jones, he can observe everything that's required of him in his animal waste management plan and he can still be in violation of this paragraph C?

A: The animal waste management plan is one piece of the statutory requirements, and there are many, many, many requirements in that animal waste requirement plan. However, throughout the statute there are also things regarding -- for example, look at the BMP section that we talked about a second ago in the statute on the 10-9.7, no discharge of poultry wastes to the waters of the state. No waters -- well, there's a given, but poultry waste handling, treatment, management and removal shall not create an environmental or a public health hazard, not result in the contamination of waters of the state and conform to such other handling, treatment, management and removal requirements deemed necessary by the department. Again, in the statute under C6C, poultry waste shall only be applied to suitable land at appropriate times and rates. Discharge or runoff of waste from the application site is prohibited. I mean, all of those things work together to create the provisions that Farmer Jones has to comply with.

*See* Ex. 1 (Gunter Depo., 175:23-177:1) (emphasis added); *see also* Ex. 1 (Gunter Depo., 177:2-178:4 & 180:5-181:4); Ex. 3 (Parrish Depo., 140:16-17) ("There are more regulations than just the plan"); Ex. 3 (Parrish Depo., 152:24- 153:1) ("I can give you a whole list of things they have to -- in addition to [following the waste management plan] that they have to adhere to . . ."); Ex. 5 (Strong Depo., 211:7-14) (testifying that he agreed that a farmer can obtain a nutrient management plan and comply with that nutrient management plan and still be violating the law as a result of site-specific runoff from his application of poultry waste); Ex. 5 (Strong Depo.,

220:4-9) ("It is possible to violate the laws of the state while complying with a nutrient management plan").<sup>5</sup>

In sum, neither registration with the State pursuant to 2 Okla. Stat. § 10-9.3, nor the existence of an animal waste management plan, constitutes a permit or authorization to land apply poultry waste. Rather, 2 Okla. Stat. § 10-9.7 simply sets out minimal criteria that must be met in a registered poultry feeding operation -- including that one's best management practices

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<sup>5</sup> In a variant on the legally incorrect animal-waste-management-plan-as-permit argument, it has been asserted by at least one Defendant (Peterson) that the Oklahoma / Natural Resources Conservation Service (NRCS) Conservation Practice Standard for Nutrient Management -- Code 590 -- is the "applicable standard adopted by the Oklahoma Legislature to govern the land application of poultry litter . . .". See, e.g., DKT #2145, pp. 2, 12-13, Facts ¶¶ 5, 35-38. This assertion is also legally incorrect. The ORPFOA contains numerous standards and requirements pertaining to the land application of poultry waste and mandates compliance with all of its provisions. The attempt to single out one of these provisions and label it as the governing standard is contrary to and inconsistent with the plain language of the ORPFOA itself. The ORPFOA provides that: "[a]ll poultry feeding operations shall utilize Best Management Practices and shall meet the conditions and requirements established by subsection B of this section and by rules promulgated by the State Board of Agriculture pursuant to the Oklahoma Registered Poultry Feeding Operations Act." See 2 Okla. Stat. § 10-9.7(A). As noted above, best management practices, include, without limitation, prohibitions on (1) creating an environmental or public health hazard, and (2) contamination of the waters of the state. See 2 Okla. Stat. § 10-9.7(B). Best management practices also require compliance with such other management requirements in the ODAFF rules implementing the Act. See *id.* Furthermore, the ORPFOA contains other applicable requirements, such as (1) "[l]and application rates of poultry waste shall be based on the available nitrogen and phosphorous content of the poultry waste and shall provide controls for runoff and erosion as appropriate for site conditions," (2) "poultry waste shall only be applied to suitable land at appropriate times and rates," (3) "[t]iming and rate of applications shall be based on assimilation capacity of the soil profile, assuming usual nutrient losses, expected precipitation, and soil conditions," and, of course, (4) "[d]ischarge or runoff of waste from the application site is prohibited." See 2 Okla. Stat. § 10-9.7(C)(5) & (6)(c). All of these standards apply to the land application of poultry waste. Thus, the soil test phosphorus (STP) maximum limits in Code 590 do not override the other provisions of the ORPFOA, and land application of poultry waste must be undertaken in compliance with all of the ORPFOA's provisions. Even if 2 Okla. Stat. § 10-9.7 were ambiguous (which it is not), the Court would have to harmonize and give effect to all of its parts. See *AMF Tubescope Co. v. Hatchel*, 547 P.2d 374, 380 (Okla. 1976). The maximum application rate found in Code 590 simply does not authorize land application in violation of the ORPFOA's other requirements, including the ORPFOA's prohibition of runoff of poultry waste from the application site. There are other matters to be considered in addition to the maximum application rates in Code 590.

ensure that "[p]oultry waste handling, treatment, management and removal . . . not create an environmental or a public health hazard, [and] not result in the contamination of waters of the state . . ." and "[d]ischarge or runoff of waste from the application site is prohibited." An animal waste management plan is but one piece of guidance that should be considered in a registered poultry feeding operation's effort to ensure that there is no run-off of poultry waste to the environment.

Finally, most certainly, nothing in this statutory program constitutes the promotion by the State of land application of poultry waste. In fact, the entire focus of this program is avoiding run-off from land application of poultry waste.

**2. The Oklahoma Poultry Waste Transfer Act, 2 Okla. Stat. § 10-9.13, *et seq.***

Underscoring the fact that the State does not promote or encourage the land application of poultry waste in the IRW is the Oklahoma Poultry Waste Transfer Act (the "OPWTA"). The purpose of the OPWTA is "to encourage the transfer of poultry waste out of designated nutrient-limited watersheds and nutrient vulnerable groundwater as designated in the most recent Oklahoma's Water Quality Standards." *See* 2 Okla. Stat. § 10-9.13(A) (emphasis). To that end, the legislature directed ODAFF to "develop a plan to encourage the transfer of poultry waste out of designated nutrient-limited watersheds and nutrient-vulnerable groundwater as designated by the most recent Oklahoma's Water Quality Standards." *See* 2 Okla. Stat. § 10-9.13(B). The IRW has been designated a nutrient limited watershed by the Oklahoma Water Resources Board. *See* Okla. Admin. Code § 785:45-5-29.<sup>6</sup> Plainly, nothing in this statutory program constitutes a

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<sup>6</sup> A "nutrient-limited watershed" means "a watershed of a waterbody with a designated beneficial use which is adversely affected by excess nutrients as determined by Carlson's Trophic State Index (using chlorophyll-a) of 62 or greater, or is otherwise listed as

permit to land apply poultry waste in the IRW, authorization to land apply poultry waste in the IRW, promotion of land application of poultry waste in the IRW, or the like. Rather, the purpose to this statutory program is to protect the environment and the population from the risks of poultry waste through encouraging the removal of poultry waste from the IRW.

**3. The Oklahoma Poultry Waste Applicators Certification Act, 2 Okla. Stat. § 10-9.16, *et seq.***

The Oklahoma Poultry Waste Applicators Certification Act (the "OPWACA") provides for the licensing of persons land applying poultry waste in Oklahoma. *See* 2 Okla. Stat. § 10-9.16, *et seq.* All persons engaged in land application of poultry waste in Oklahoma must get a certificate (*i.e.*, a license) from the State Board of Agriculture. *See* 2 Okla. Stat. § 10-9.17(A) & (B). In order to get a certificate, a candidate must meet the applicable certification standards and pay a licensing fee. *See* 2 Okla. Stat. § 10-9.17(D) & (E). The act requires certified poultry waste applicators to make annual reports to the ODAFF. *See* 2 Okla. Stat. § 10-9.18(A). It also places restrictions on the rates of application of poultry waste by certified poultry waste applicators, and such applications must comply with animal waste management plans, or for applications conducted on land operated by entities not regulated pursuant to the ORPFOA that are located in a nutrient-limited watershed (like the IRW), with conservation plans. *See* 2 Okla. Stat. § 10-9.19(2) & (3); 2 Okla. Stat. § 10-9.19a(1) & (2). Significantly, nothing in the OPWACA relieves an applicator from the requirements of the ORPFOA, including those requirements that "[p]oultry waste handling, treatment, management and removal . . . not create an environmental or a public health hazard, [and] not result in the contamination of waters of the state . . ." and "[d]ischarge or runoff of waste from the application site is prohibited." Moreover,

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'NLW' in Appendix A of [Chapter 45 of the Oklahoma Administrative Code]." *See* Okla. Admin. Code § 785:45-1-2.

possession of a certificate is neither a permit to land apply poultry waste on any particular parcel of land, nor authorization to land apply poultry waste on any particular parcel of land. In short, rather than promote the land application of poultry waste, this statutory program places restrictions on land application of poultry waste in a further effort to address the pollution problems caused by land application of poultry waste.

**4. The Education Program on Poultry Waste Management, 2 Okla. Stat. § 10-9.22, *et seq.***

The purpose of the Education Program on Poultry Waste Management (the "EPPWM") is to provide for educational programs on poultry waste management in an effort to protect the public health and safety of the citizens of Oklahoma from the potential threat of water contamination from poultry waste. *See* 2 Okla. Stat. § 10-9.22(A)(2), *et seq.* To ensure full and adequate funding, the legislature directed poultry integrators doing business in Oklahoma to contract with Oklahoma State University through the Oklahoma Cooperative Extension Service to provide educational training courses and certification of operators of poultry feeding operations and land applicators of poultry waste and to make funding payments. *See id.* Plainly, nothing in the EPPWM constitutes a permit to land apply poultry waste in the IRW, authorization to land apply poultry waste in the IRW, or promotion of land application of poultry waste in the IRW. Rather, the purpose of this program is to protect the environment and the population from the risks of poultry waste.

**5. Other general statutory provisions and policies**

Complementing the Oklahoma statutory programs specifically directed at poultry waste are other Oklahoma statutory provisions designed to protect the Oklahoma environment. For instance, the Environmental Quality Code provides that "[i]t shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a

location where they are likely to cause pollution of any air, land or waters of the state. Any such action is hereby declared to be a public nuisance." *See* 27A Okla. Stat. § 2-6-105(A). *See also* 27A Okla. Stat. § 2-6-102 ("Whereas the pollution of the waters of this State constitutes a menace to public health and welfare . . . it is hereby declared to be the public policy of this state . . . to provide that no waste or pollutant be discharged into any waters of the state or otherwise placed in a location likely to affect such waters without first being given the degree of treatment or taking such other measures as necessary to protect the legitimate beneficial uses of such waters [and] to provide for the prevention, abatement and control of new or existing water pollution . . . ").

Similarly, the Agricultural Code provides that "[i]t shall be unlawful and a violation of the Oklahoma Agricultural Code for any person to cause pollution of any air, land or waters of the state by persons which are subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry pursuant to the Oklahoma Environmental Quality Act." *See* 2 Okla. Stat. § 2-18.1(A).

Poultry growing operations in Oklahoma are required to comply with these more generalized acts as well. These two acts thus buttress the more specific provisions of the ORPFOA prohibiting any run-off of poultry waste, prohibiting the creation of any environmental or public health hazards from poultry waste, and prohibiting any contamination of the waters of the State from poultry waste. Nothing in either of these two acts permits or authorizes the land application of poultry waste. Nor do they promote the land application of poultry waste.

**B. As the State does not permit, authorize or promote land application of poultry waste, argument, questioning or introduction of "evidence" by Defendants at trial that suggests or tends to suggest that it does would be improper**

As demonstrated above, as a matter of law, none of the statutory programs or provisions pertaining to poultry waste constitutes a permit to land apply poultry waste. None constitutes an authorization to land apply poultry waste in any specific amount or at any specific location. And none promotes land application of poultry waste. Rather, the focus of all of these statutory programs and provisions is to address the environmental hazards of land application of poultry waste. Underscoring this fact are the more generalized Oklahoma statutory programs found in the Environmental Quality Code and the Agricultural Code. Therefore, assertions by Defendants that the State permits, authorizes or promotes land application of poultry waste are, as a matter of law, incorrect and thus irrelevant, *see* Fed. R. Evid. 401 & 402, and no such argument, questioning or introduction of "evidence" by Defendants should be allowed.

**C. Even assuming *arguendo* that these statutory programs were to permit, authorize or promote land application of poultry waste, argument, questioning or introduction of "evidence" by Defendants would be irrelevant with respect to all of the State's claims except those founded on violations of the Oklahoma Registered Poultry Feeding Operations Act (Count 8)**

Even assuming *arguendo* that this Court were to conclude that the statutory programs discussed above constituted a permit, authorization or promotion by the State to land apply poultry waste, such "evidence" would still be irrelevant with respect to all but one of the State's state law claims as a matter of law.<sup>7</sup> For instance, it is well-established under Oklahoma law that approval of an activity by an administrative agency alone is insufficient to transform what would otherwise be considered a nuisance, abatable or subject to injunction, into a legalized nuisance. *See Sharp v. 251st Street Landfill, Inc.*, 810 P.2d 1270, 1274 fn. 4 (Okla. 1991), *overruled on other grounds*. Additionally, "[t]he fact that a person or corporation has authority to do certain

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<sup>7</sup> Importantly, it should not be overlooked that the ORPFOA did not become effective until July 1, 1998. As such, even under Defendants' erroneous interpretation of these statutory schemes, there can be no assertion that prior to this date the State purportedly permitted, authorized or promoted the land application of poultry waste.



acts does not give the right to do such acts in a way constituting an unnecessary interference with the rights of others. A license, permit or franchise to do a certain act cannot protect the licensee who abuses the privilege by erecting or maintaining a nuisance." *See Briscoe v. Harper Oil Co.*, 702 P.2d 33, 37 (Okla. 1985); *see also Union Oil Co. of California v. Heinsohn*, 43 F.3d 500, 504 (10th Cir. 1994) ("Licensing is not itself enough to avoid liability"); OUJI § 9.11 ("Compliance with requirements of the [statute / ordinance] does not excuse one from the duty to exercise ordinary care"). Yet further, 12 Okla. Stat. § 12 provides that "[t]he common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object."

Similarly, purported state permitting or authorization of conduct would be irrelevant with respect to the State's claim under RCRA, as state programs do not supersede RCRA endangerment claims. *See, e.g., Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992); *Eckardt v. Gold Cross Services, Inc.*, 2006 U.S. Dist. LEXIS 65831, \*7-8 (D. Utah March 28, 2006) (collecting cases); *T&B Limited, Inc. v. City of Chicago*, 369 F. Supp. 2d 989, 993 (N.D. Ill. 2005); *Stewart-Sterling One, LLC v. Tricon Global Restaurants, Inc.*, 2002 U.S. Dist. LEXIS 15746, \*8 (E.D. La. Aug. 9, 2002).

Purported state permitting or authorization of conduct would also be irrelevant with respect to the State's claims under CERCLA, as affirmative defenses under CERCLA are limited

and circumscribed.<sup>8</sup> *See, e.g.*, 42 U.S.C. § 9607(b) (setting forth defenses to a section 107 claim); *Morrison Enterprises v. McShares, Inc.*, 302 F.3d 1127, 1132 (10th Cir. 2002) ("Section 9607(b) provides very limited defenses to liability").

Therefore, even if this Court were to (erroneously) find that the State permitted, authorized or promoted land application of poultry waste, that "fact" would, as a matter of law, be irrelevant to the State's claims (except those founded on violations of the Oklahoma Registered Poultry Feeding Operations Act (Count 8)). As such, even if the Court were to deny the State's Motion, the State would still be entitled to a limiting instruction.

**D. Even were the Court to (erroneously) find that an animal waste management plan constituted a State permit or authorization to make a specific land application of poultry waste at a specific rate, Defendants should be precluded from arguing compliance with such purported permits and authorizations**

Even were the Court to (erroneously) find that animal waste management plans constituted State permits or authorizations, Defendants should be precluded from arguing their poultry waste has in fact been applied in compliance with animal waste management plans because Defendants have disclaimed any knowledge of where their poultry waste has been land applied, how much has been land applied, or the soil test phosphorus for any application location.<sup>9</sup> *See, e.g.*, Ex. 6 (Responses of Cal-Maine Farms and Cal-Maine Foods to March 17, 2009 Interrogatories, Nos. 1 & 2) ("Cal-Maine does not have knowledge of when poultry litter is applied within the IRW, where it is applied, how much is applied, or the STP for any location

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<sup>8</sup> The State has moved for reconsideration of the Court's order addressing its CERCLA claims, *see* DKT #2392, and accordingly, in the interests of judicial economy, is including this argument in this Motion.

<sup>9</sup> In fact, the present action constitutes a claim by the State that Defendants are not in compliance with the law. Assertions by Defendants that they have not been cited by the State for violations does not suffice to establish compliance.

before its application"); Ex. 7 (10/9/07 Cal-Maine 30(b)(6) Depo., 221:8-19) ("Cal-Maine doesn't know specifically any details about the application by the -- by the contract producers"); Ex. 8 (Responses of Peterson Farms to March 17, 2009 Interrogatories, Nos. 1 & 2) ("Peterson Farms does not have knowledge of when poultry litter is applied within the IRW, where it is applied, how much is applied, or the STP for any location before its application"); Ex. 9 (Responses of Tyson Defendants to March 17, 2009 Interrogatories, Nos. 1 & 2) (The Tyson Defendants have "no knowledge of specific land applications of poultry litter generated at poultry feeding operations under contract with it"); Ex. 10 (Responses of Tyson Defendants to September 13, 2007 Interrogatories, No. 6 ("The Tyson Defendants do not possess sufficient information to respond to this interrogatory" requesting information about land application of poultry waste generated by their birds in the IRW); Ex. 11 (7/21/08 Cargill 30(b)(6) Depo., 230:6-11) ("We don't track the poultry litter on our contract producers' farms"); Ex. 12 (6/24/08 Cargill 30(b)(6) Depo., 84:9-12) (testifying that prior to July 1, 1998, Cargill did not know what its contract growers did with the poultry waste that was produced by their birds); Ex. 13 (Responses of Simmons to March 17, 2009 Interrogatories, No. 1) ("To the extent Plaintiff is seeking the location that poultry litter from a farm under contract with Simmons may have been land applied, Simmons does not have that information other than in the form of 'Grower Surveys' which are voluntary and have only been used in the past few years"); Ex. 14 (Responses of George's to September 13, 2007 Interrogatories, No. 6) (Aside from that poultry waste that George's has transported from the IRW, "George's does not receive or maintain copies of those [poultry waste management] filings or records for operations in either State as its relates to contract growers . . ."). Simply put, in light of the foregoing, assertions of purported compliance lack any foundation and would be irrelevant and / or run the risk of confusing the issues and misleading the jury. As

such, such assertions by Defendants should be excluded under Fed. R. Evid. 401 & 402 and / or Fed. R. Evid. 403.

### **III. Conclusion**

WHEREFORE, premises considered, the State's motion for an order precluding certain argument, questioning or introduction of "evidence" by Defendants pertaining to the State's regulation of poultry waste should be granted. Specifically, Defendants should be precluded from arguing, questioning or introducing "evidence" that suggests or tends to suggest that (1) the State issues permits for land application of poultry waste; (2) the State issues animal waste management plans; (3) an animal waste management plan is a permit to land apply poultry waste; (4) an animal waste management plan permits or authorizes a specific land application rate of poultry waste; (5) the State approves or has approved any particular instance of land application of poultry waste in the IRW; (6) compliance with an animal waste management plan necessarily equates to full compliance with Oklahoma law applicable to land application of poultry waste; or (7) the State promotes land application of poultry waste in the IRW.

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